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ABSTRACT

The Equal Access Act of 1984 was drafted to implement access for religious clubs to public secondary schools, but with constitutionally protected safeguards to preclude entanglement of church and state. A number of challenges were made on the constitutional grounds of excessive entanglement of church and state, as well as what the definition of "limited open forum" would be. The case that the Supreme Court chose to hear, "Board of Education of Westside Community Schools v. Mergens," contained both elements and was decided in 1990. Now school administrators must face the dilemma of creating, maintaining, and protecting "limited open forums" within schools. Ohio County Schools, which include the schools in Wheeling, West Virginia, are a microcosm of American society with a student population of 6,500 K-12 students from rural, suburban, and urban backgrounds. Policy and regulations to govern the formation and operation of extracurricular clubs and activities were provided in draft form to school administrators, employees, parents, religious and legal groups and were placed on public comment prior to review and adoption by the board of education. The appendixes contain the text of the Equal Access Act and the regulations adopted by the board. (9 references) (MLF)

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The Equal Access Act:
Policy and Regulations for Implementation

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The Equal Access Act

Policy and Regulations for Implementation

The Equal Access Act of 1984 (EAA, Title VIII of Public Law 98-377) was passed by Congress with the apparent intent of permitting religious clubs access to public schools without abridging freedoms of students and staff and, specifically, of not invoking excessive entanglement criteria of the U.S. Supreme Court's decisions and appellate court decisions regarding separation of church and state [Lemon v. Kurtzman, 403 U.S. 602 (1971); Bender v. Williamsport Area School District, 741 F.2d 538 (1983); Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F. 2d 1038 (1983); Brandon v. Board of Education, 635 F.2d 971 (1981); Widmar v. Vincent, 102 S. Ct. 269 (1981)].

The events leading to passage of the act included unsuccessful attempts of school districts to permit, or require, prayer in schools as well as a wave of conservativism in national and local politics. In 1981 the U.S. Supreme Court ruled in Widmar v Vincent (102 S.Ct. 269) that a state university had assumed an obligation to provide equal access to religiously oriented activities by creating a limited open forum for other kinds of activities.

The court's rationale was that forbidding religious content from expression on campus while permitting other forms of free expression was discriminatory and an

abridgement of free speech.

In Widmar v Vincent [102 S.Ct. 269 (1981)], however, the court also made it clear that the university also had a right to exclude even first amendment activities that violate reasonable rules or substantially interfere with the opportunity of other students to obtain an education.

Congress drafted the Equal Access Act with the Supreme Court's recent Widmar ruling in mind and with language that paralleled the court's as much as possible. The Equal Access Act, thus, was drafted to implement obligatory access for religious clubs to public secondary schools, but, also with constitutionally protected safeguards to preclude entanglement of church and state. Clubs that are permitted access are to be wholly voluntary, without sponsorship, without financial support, without school personnel direction and sanction, and may not interfere with the orderly provision of education to both club participants and nonparticipants.

Shortly after passage of the act, a number of challenges were made, as expected, on the constitutional grounds of excessive entanglement of church and state, as well as what the definition of "limited open forum" would be. The case that the court chose to hear, Board of Education of Westside Community Schools v Mergens (110 S.Ct. 2356) contained both elements and was finally decided in 1990.

That decision contained an extensive review of what clubs and activities could potentially trigger a limited open

forum at a secondary school. In spite of many convoluted attempts by the school system to relate all clubs and activities to some curricular content and, thus, to avoid opening the school to religiously oriented clubs, the court ruled that the language "curriculum related" as used in the Equal Access Act does not include everything remotely related to abstract educational goals.

The court reasoned that even if a public secondary school allows only one noncurriculum related student group to meet, obligations of the Equal Access Act are triggered and the club may not deny other clubs equal access to meet on school premises during noninstructional time on the basis of the content of their speech.

The court further reasoned that the term "noncurriculum related student group," as used in the act, refers to those student groups that are not related to the body of courses offered by the school. Whether a specific student group is a "noncurriculum student group" depends upon a particular school's curriculum, but those determinations are subject to factual findings. The term "curriculum related" is narrowly defined and cannot be extended to include everything remotely related to abstract educational goals.

The appendix to the decision lists all clubs at Westside Community High School, and the Chess Club, which is probably common to most high schools, the Scuba Diving Club, and service groups that work with special education students were specifically singled out by the court as not

being sufficiently curriculum related to preclude triggering of a limited open forum.

Administrators of schools who believe they have only curriculum related clubs need to carefully review the court's logic to quickly realize that Congress has found a way to penetrate the vast number of public high schools in this country to make them subject to equal access. Should there be a public high school that does not have at least one club or activity that triggers this act, then most likely the administration of that school would be subject to dismissal for not providing a thorough and efficient education for students.

The court also extended its logic in Widmar v Vincent [102 S.Ct. 269 (1981)] to clearly state that religious club meetings can occur only during noninstructional time and that the act, if followed as written, would not risk excessive entanglement between government and religion. The task, then, for school administrators is to devise policy and regulations that incorporate the provisions of the act while simultaneously protecting the rights of staff and students who do not want to be involved in the religiously oriented activities of club members. An equally important provision of the act that has not yet seen litigation, but which has equally important implications for administrators, is that political content is also protected free speech.

The Equal Access Act is an odd mixture of the conservatives' desire to permit traditional mainstream

Christian oriented clubs access to public schools with the liberals' desire to ensure that free speech remains a constitutionally protected right in those same public schools. The same act that protects the fundamentalists' right to form a Bible Club also protects the Hare Krishnas' right to form a chanting circle.

Because the public high school remains as our society's first line for social reform, integration, and mixture of languages, cultures, races and creeds, it is only fitting that now administrators must face the dilemma of creating, maintaining and protecting "limited open forums" within schools in a society that hasn't yet figured out how to manage cultural pluralism outside of the schools.

Ohio County Schools, which includes Wheeling, West Virginia, is a microcosm of American society with a student population of 6500 students in K-12 from rural, suburban, and urban backgrounds. It provides an example of a typical district's attempt to deal with this potentially explosive issue with as much preparation, planning, and community involvement as possible.

The enclosed policy and regulation were drafted by the system in accordance with the Supreme Court's decision and the language of the Equal Access Act. They were then provided in draft form to school administrators, employee groups, parent organizations, religious groups, legal groups, the local Anti-Defamation League of B' Nai B'rith and placed on public comment prior to review and adoption by the Board

of Education. Although it remains too early to know if it will survive challenge and to know if its provisions are sufficiently broad to cover every contingency, it does represent a set of policy and regulations that have been carefully constructed and scrutinized by an entire community prior to adoption.

Districts that are contemplating adoption of policy, and that probably should be every district with a public secondary school in the country, can benefit from the experience of Ohio County Schools in devising a workable set of guidelines.

References

Bender v. Williamsport Area School District, 741 F. 2d 538 (1983).

Brandon v. Board of Education, 635 F. 2d 971 (1981).

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Westside Community Schools v. Megens, 110 S. Ct. 2356 (1990).

Widmar v. Vincent, 102 S. Ct. 2169 (1981).

APPENDIX A

The Equal Access Act

SEC.801. This title may be cited as "The Equal Access Act."

DENIAL OF EQUAL ACCESS PROHIBITED

SEC.802. (a) It shall be unlawful for any public secondary school which receives Federal financial assistance and with has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

(b) A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.

(c) Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that --

(1) the meeting is voluntary and student-initiated;
(2) there is no sponsorship of the meeting by the school, the government, or its agents or employees;
(3) employees or agents of the school or government are present at religious meetings only in a non-participatory capacity;
(4) the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and
(5) nonschool persons may not direct, conduct, control, or regularly attend activities of student groups.

(d) Nothing in this title shall be construed to authorize the United States or any State or political subdivision thereof--

(1) to influence the form or content of any prayer or other religious activity;
(2) to require any person to participate in prayer or other religious activity;
(3) to expend public funds beyond the incidental cost of providing the space for student-initiated meetings;
(4) to compel any school agent or employee to attend a school meeting if the content of the speech at the meeting is contrary to the beliefs of the agent or employee;
(5) to sanction meetings that are otherwise unlawful;
(6) to limit the rights of groups of students which are not of a specified numerical size; or
(7) to abridge the constitutional rights of any person.

(e) Notwithstanding the availability of any other remedy under the Constitution or the laws of the United States, nothing in this title shall be construed to authorize the United States to deny or withhold Federal financial

assistance to any school.

(f) Nothing in this title shall be construed to limit the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary.

DEFINITIONS

SEC. 803. As used in this title--

(1) The term "secondary school" means a public school which provides secondary education as determined by State law.

(2) The term "sponsorship" includes the act of promoting, leading, or participating in a meeting. The assignment of a teacher, administrator, or other school employee to a meeting for custodial purposes does not constitute sponsorship of the meeting.

(3) The term "meeting" includes those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum.

(4) The term "noninstructional time" means time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends.

SEVERABILITY

SEC.804. If any provision of this title or the application thereof to any person or circumstances is judicially determined to be invalid, the provisions of the remainder of the title and the application to other persons or circumstances shall not be affected thereby.

CONSTRUCTION

SEC.805. The provisions of this title shall supersede all other provisions of Federal law that are inconsistent with the provisions of this title.

Students

Extracurricular Activities

The Equal Access Act, Title VIII of Public Law 98-377, requires secondary schools which offer extracurricular clubs and activities to students not to discriminate against any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

Secondary schools in Ohio County offer extracurricular activities that meet the definition of a limited open forum as envisioned by the Act. Therefore, the administration of Ohio County Schools is required to develop a regulation to govern the formation and operation of extracurricular clubs and activities which conforms to the expressed and implied intent of the Equal Access Act and to ensure that such clubs operate in a manner that school order and discipline are maintained and that no establishment of religion occurs through direct or implied school sponsorship of such activities.

POLICY ADOPTED: November 26, 1990

OHIO COUNTY BOARD OF EDUCATION

Extracurricular Activities

All Ohio County Schools secondary schools will permit the formation of both sponsored and unsponsored extra-curricular clubs and activities. All such activities, sponsored or unsponsored, are open to participation by all students regardless of race, religion, color, national origin, ancestry, gender, native language, handicapping condition, or marital status. No activity or club may operate to abridge the constitutional rights of any student or staff member.

Sponsored activities are those activities that have the full approval, support, active participation and supervision of school officials. Such activities may not espouse a particular religious, political, or philosophical doctrine and must strictly avoid the inclusion of such dogma in formal and informal activities of the club.

Unsponsored activities are those which meet on school grounds beyond the instructional day. Such activities must register with the principal and must agree to the following constraints:

1) All activities or meetings must conform to existing policies, regulations, and procedures that govern operation of sponsored activities.

2) The meeting of club members or participants is voluntary and student-initiated.

3) There is no sponsorship of the meeting by the school or staff.

4) An employee of the school system must be present at all meetings, but only in a supervisory and nonparticipatory capacity.

5) Meetings or activities must not materially and substantially interfere with the orderly conduct of educational activities of the school.

6) Nonemployees may not direct, conduct, control, or regularly attend activities of the club.

7) No expenditure of public funds beyond the incidental cost of providing space is permitted.

8) No school employee may be compelled to attend a meeting of the club or any activity if the content of the speech at the meeting is contrary to the beliefs of the employee.

9) No club or activity may use the name of the school or imply the sponsorship or affiliation with the school in any activity including fund raising or community involvement.

10) Unsponsored clubs and activities will have access to the school newspaper, bulletin boards, public address system, and any other communication procedure on the same basis as any sponsored school activity.

11) All unsponsored clubs or activities will use the following disclaimer: The views expressed here may or may not reflect those of the school administration, staff, county administration or county board of education and are neither approved nor disapproved by them.

REGULATION ADOPTED: November 26, 1990

OHIO COUNTY BOARD OF EDUCATION